Supreme Court, U.S.
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No. 95-1594

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BARBARA A. DE BUONO, M.D., in her capacity as New York State Commissioner of Health; KAREN SCHIMKE, in her capacity as New York State Executive Deputy Commissioner of Health; DEPUTY DIRECTOR, Division of Health Care Financing, Office of Health Systems Management, New York State Department of Health,
Petitioners,

v.

NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND, by its Trustees, JOHN BOWERS, JAMES CAPO, FRANK LONARDO, WILLIAM P. LYNCH, M. BRIAN MAHER, JAMES P. MELIA, GERALD OWENS, and PETER VICKERS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

THE EFFECT OF NEW YORK'S HOSPITAL ASSESSMENT ON ERISA PLANS IS INDISTINGUISHABLE FROM THE EFFECT FOUND NOT TO BE PREEMPTED BY THIS COURT IN *TRAVELERS*.

Attempting to distinguish this case from *New York State Conference of Blue Cross & Blue Shield Plans v.*

Travelers, Inc. Co., 115 S. Ct. 1671 (1995) (*"Travelers"*), respondents argue that the hospital assessment in this case directly assesses contributions and other payments for medical benefits provided to plan beneficiaries, while the assessments in *Travelers* had indirect effects only (Resp. Br. 9-10). This argument misconstrues the state law and its affect on plans.

Section 2807-d of the Public Health Law imposes a 0.6 percent assessment on hospital income received from most sources, including for patient care services. 28-a.[1] The laws at issue in *Travelers* set hospital rates for all patients, imposed surcharges on certain rates, and imposed an assessment on health maintenance organizations ("HMOs"). N.Y. Pub. Health Law §§ 2807-c(1)(a), (b), (c), 2807-c(2-a). The effect on ERISA plans in both instances is identical because none of these laws apply to the plans themselves. The hospital rate setting statute in *Travelers* applies to all hospital bills; the HMO assessment applies to all HMOs; and the hospital assessment involved in this case applies to all hospitals. Because ERISA plans may provide hospital care benefits for their participants, the hospital assessment, like the laws at issue in *Travelers*, may increase the cost of providing such benefits to plans. Contrary to respondents' claim, however, that the assessment in this case "directly assesses contributions," (Resp. Br. at 9), that occurs, for any of these laws, only when ERISA plans pay for health care services for their participants.

This analysis is not affected by the facts of this case in which an ERISA plan owns and operates the medical center which is subject to the assessment. The assessment is imposed on hospital income, regardless of source. Thus, the effect on the plan here arises only as the result of a plan's payments to the hospital to provide benefits to participants. All hospitals receive a large portion of their income for patient care services from ERISA plans, so all

[1] References to the appendix submitted with the petition for a writ of certiorari are shown as "—a."

ERISA plans will be affected by the hospital assessment. The effect on a plan is the same whether or not it owns a hospital subject to the assessment.

The only difference between this case and a case involving a hospital not owned by an ERISA plan is simply the proportion of the hospital's total assessment which is paid by a single plan. In this case, because the hospital which is subject to the assessment is owned by an ERISA plan, all of the income subject to the assessment is paid by one plan. In fact, even in this case much of the income assessed comes from another ERISA plan, which has contracted with respondents to use the medical center. For a hospital which is not owned by an ERISA plan, the income assessed will come from a number of different ERISA plans. That difference, however, does not provide a principled basis for differentiating between the effect of this hospital assessment on this ERISA plan, the effect of this hospital assessment on other ERISA plans, or the effect of the hospital assessments in *Travelers* on plans subject to those assessments.

There is nothing in *Travelers* which supports a conclusion that an assessment on hospital income that does not relate to a plan which pays the assessment, but does not own the hospital, relates to a plan which pays the assessment when it or another plan owns the hospital. Nor can respondents effectively differentiate this case from *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). In each case there was no third party between the legal obligation imposed by the state law and the plan. The source of the administrative cost was characterized as indirect in *Mackey*, because the state law imposed substantive legal obligations upon plans which in turn raised plan costs. Here, the law imposes a tax upon hospital income which in turn raises plan costs whether or not the plan which pays a participant's bill owns the hospital.

Respondents attempt to distinguish *Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995), *cert. denied*, 116 S.

Ct. 1266 (1996), on the ground that in that case the 2% provider tax pass-through was voluntary. This ignores the fact that providing medical benefits through ownership of a hospital is also voluntary. In *Boyle*, once a pass-through occurs, the law imposes a legal obligation directly upon the plan to pay the tax. In this case once a plan chooses to own a medical center, the law imposes the obligation to pay the assessment.

Despite respondent's attempt to suggest otherwise, the standard for ERISA preemption of tax laws is no different than the standard for ERISA preemption of any other law. ERISA imposes no stricter preemption standards on state tax laws than on any other state law. Section 514 (b)(5)(B)(i) of ERISA, 29 U.S.C. § 1144(b)(5)(B)(i), simply provides that "any tax law *relating to* [ERISA] plans" is not exempt from preemption (emphasis added). Thus, the same "relates to" test of preemption which applies to state laws generally applies to state tax laws. This hospital assessment differs significantly from the laws involved in the cases relied upon by respondents (Resp. Br. at 5). In all of those cases, unlike the present case, the courts preempted state taxes or assessments because they referred to, or were directed specifically at, ERISA plans. *E-Systems, Inc. v. Pogue*, 929 F.2d 1100 (5th Cir.), *cert. denied*, 112 S. Ct. 585 (1991); *General Motors Corp. v. California Bd. of Equalization*, 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988); *Birdsong v. Olson*, 708 F. Supp. 792, 798 (W.D. Tex. 1989); *National Carriers Conference Comm. v. Heffernan*, 454 F. Supp. 914 (D. Conn. 1978). These cases fit squarely within the Court's holdings which have preempted state laws which refer to, are predicated upon, or which function only through the existence of, ERISA plans. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992). The Court has never held, however, as respondents urge, that a law of general

application with only an economic impact on plans is preempted.

Finally, respondents attempt to distinguish the hospital assessment from other forms of generally applicable regulation such as sales tax, or unemployment tax, because it "affects ERISA plans *qua* employee benefit plans" (Resp. Br. at 17). This distinction, however, rests on a premise accepted by the Second Circuit in the original opinion in this case but subsequently rejected by the Supreme Court in *Travelers*, that health care regulation is to be treated differently than any other regulation under ERISA's preemption provision.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May 10, 1996